United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 985

Case No. 1091: ALAM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Victor Yenyi Olungu; Ms. Marsha A. Echols;

Whereas at the request of Sultana Alam, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 31 July 1999, the Applicant filed an application containing pleas which read, in part, as follows:

"7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules in order to hear evidence from the Applicant and from a number of experts in the field of gender studies;

(d) *To order* the production of the following official documents:

...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To rescind* the decision of the Secretary-General based upon the recommendation of the Joint Appeals Board to make no recommendation with respect to her appeal;

(b) *To order* that the Applicant be reinstated in her post or in a comparable post with effect from 1 August 1997 until the date of her retirement from service, with full pay and benefits;

(c) *To find and rule* that the Joint Appeals Board erred as a matter of law and equity in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under the Staff Regulations and Rules;

(d) *To award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(e) *To fix* pursuant to article 9, paragraph 1 of the Statute and rules, the amount of compensation to be paid in lieu of specific performance at four year's net base pay, representing the salary the Applicant would have received had she remained in service to age 62, in view of the special circumstances of the case;

(f) *To award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 13 March 2000;

Whereas the Applicant filed written observations on 26 September 2000;

Whereas, on 20 November 2000, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Population Fund (UNFPA), Country Support Team (CST) in Suva, Fiji, on 1 February 1994, as an Adviser for Gender Population

and Development (GDP) on a fixed–term appointment at the L-5 level under the 200 Series for an initial six-month period, which was extended until December 1994.

In September 1994, the Applicant was diagnosed with breast cancer and evacuated to Sydney, Australia, for treatment from 28 September 1994 until 3 January 1995. Thereafter she was on medical leave in the United States from 12 to 29 January 1995. On 16 February 1995, the United Nations Medical Director advised the Personnel Assistant, UNDP, that the Applicant was not medically fit for an extension of her appointment on Suva and should be medically classified as "2A" (disability related to reservations about performance of professional duties). However, it was decided by the Acting Chief, Personnel Branch, on 10 March 1995, to extend the Applicant's contract in Suva through the end of 1995 since UNFPA was prepared to assume the cost of frequent medical evacuations. The Applicant received subsequent extensions of her fixed-term appointment, the last of which expired on 31 July 1997.

On 10 April 1995, in a confidential memorandum to the Applicant's supervisor (the Director, CST, Suva) about her then recent mission to Papua New Guinea, the Applicant complained about the negative and vindictive attitude expressed by the Country Director toward her.

On 11 May 1995, the Director, CST, Suva, filed her Performance Assessment form (PAF) for the period February through December 1994 and gave her a rating "4" (needs some improvement).

On 6 June 1995, the Applicant submitted an "umbrella project proposal" on Gender Population and Development for Palau, Federated States of Micronesia and Marshall Islands. In a letter to the Applicant's supervisor dated 14 July 1995, the UNFPA Director for South Pacific, characterized the proposal as "very thin" and returned it for revision. However, the comments of the Population Education Adviser in his memorandum dated 4 August 1995 to the Director, CST, Suva, were substantially more positive.

On 2 August 1995, the Applicant's surgeon and oncologist, after an examination of the Applicant, found no recurrence of the cancer, noted that her prognosis was excellent, and stated that her ability to perform normal occupation should not be affected.

On 31 August 1995, the Applicant wrote to her supervisor with respect to her PAF. She stated that her familiarization mission to the Solomon Islands went exceptionally well despite poor planning and lack of logistical support.

On 8 September 1995, the Director, CST, Suva, wrote a new report on the Applicant's performance for the period February 1994 to August 1995, in which he pointed out that "in the view of the two Country Directors, who are major clients of the CST and hence users of her services, [the Applicant] has made very limited contribution to the Gender, Population and Development area". The Report also noted that her oral communication and negotiating skills were poor and her attitude towards Country officials and UNFPA staff were dysfunctional. The Director, CST, Suva, further observed that "it is questionable that the [Applicant] could be an effective CST adviser given the problems of interpersonal relations with country and UNFPA officials."

On 19 September 1995, the Applicant filed a rebuttal of her 1994 PAF. On 3 November 1995, the Applicant, after being informed that her contract would not be extended beyond 31 December 1995, wrote to the Executive Director, UNFPA, New York, claiming that she was the victim of "a great act of injustice", that the decision to replace her was made long ago, and that she had been "warding off numerous attacks on her for the past eleven months directed at squeezing her out of her job".

On 17 December 1995, the Applicant, in a letter to the Division of Personnel, UNFPA, New York, contested her PAF claiming it was full of oversights, misrepresentations and deliberate and vicious negativity.

On 2 February 1996, the Applicant was notified that her employment had been extended to 30 June 1996, effective 1 January 1996.

On 26 March 1996, the Applicant requested the Deputy Executive Director, UNFPA, New York, regarding his forthcoming trip to Suva, to meet with several people who could properly assess her performance and capabilities.

On 9 April 1996, the Applicant was assigned for one year effective 1 July 1996, as GDP Adviser on the CST in Bangkok, Thailand.

On 1 April 1997, the UNFPA Representative in Viet Nam wrote an appraisal of the Applicant in response to a request from the Director, CST/UNFPA, Bangkok, which stated as follows:

"We find [the Applicant] to be a very pleasant colleague, a competent expert especially on gender issues, bringing substantial experience and dedication to our programmes.

In terms of [the Applicant]'s output, and though we appreciated her mission reports, we were disappointed with the practical use we could make of it. The focus was often too much at the macro level, and we had difficulty integrating her findings into our programme development exercises. For both missions, her outputs were too much isolated from our programme and project development processes, thereby reducing the ultimate value of her contributions."

The Applicant's PAF dated 2 May 1997, covering the period July-December 1996, as well as January-April 1997 again gave the Applicant a rating of "4" (needs some improvement). The Director, CST/UNFPA, Bangkok, as her First Reporting Officer, noted that:

"[The Applicant] is *totally committed* to women's empowerment, in particular, and GDP, in general. Her output is satisfactory in terms of quantity. However, the quality of her output is not up to the standard expected from the advisers in the CST Bangkok. ..., she lacks analytical rigour. She is relatively weak in statistical analysis and in the use of data to support her arguments. ... She also lacks sufficient 'functional' knowledge of RH and PDS to do full justice to the Organization's objective at mainstreaming gender concern."

The Applicant, signing on the same date, noted her strong disagreement with the assessment.

On 12 June 1997, the Chief, Personnel Branch, UNFPA, notified the Applicant that the UNFPA Management had decided not to renew her fixed-term appointment beyond 31 July 1997.

On 30 July 1997, the Applicant requested the Secretary-General for an administrative review of the decision not to renew her contract.

On 5 December 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 24 December 1998. Its considerations and conclusion read as follows:

"***Considerations***

...

29. [The] Appellant had, however, alleged that she was the victim of discrimination and discriminatory treatment based on perceived disability and gender (...). ... The Panel

decided that [the] Appellant had failed to provide convincing evidence.

30. With respect to the alleged discrimination for disability, the Panel felt, in fact, that by volunteering to pay the cost of frequent medical evacuation, the UNFPA had made a creditable effort to accommodate her temporary disability. As for the remaining allegations, the Panel found evidence in the extensive material provided by [the] Appellant herself of her lack of judgement and her apparent willingness to assign blame to others, rather than evidence of discrimination by the Organization.

31. The Panel acknowledged that [the] Appellant faced a difficult challenge when she was assigned to Bangkok on the initiative of Headquarters, and not at the request of that Office. [The] Appellant should, nevertheless, have realized that she was being given a second chance and made an effort ... to meet that challenge. The Panel found no evidence that she made that effort, but only indications that her pattern of behaviour was the same as in her prior assignment.

Conclusion

32. The Panel unanimously decided, therefore, to make no recommendation with respect to this appeal."

On 14 April 1999, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General agreed with the Board's findings and conclusion and therefore decided to take no further action on her appeal.

On 31 July 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's fixed-term appointment was procedurally flawed and based on biased and unfair evaluations of her job performance.

2. The Respondent failed to provide the Applicant with an opportunity to be heard on the issue of her performance evaluations and consequently violated her due process rights.

3. The Applicant had a reasonable expectancy of renewal of her fixed-term appointment based on the facts and circumstances existing at the time of her original appointment.

4. The JAB committed serious errors of law and fact, ignoring significant and relevant evidence.

5. The Applicant is entitled to an award of damages for humiliation, stress, and the negative health impact occasioned by the Respondent's behavior.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment.

2. The burden of proof required of the Applicant to prove her allegations of unfair treatment, denial of fair consideration, and lack of due process has not been met by the Applicant.

3. The decision not to renew the Applicant's fixed-term appointment was based on a legitimate review of her record of performance.

4. No basis exists for the Applicant's assertion that the JAB committed errors of law and fact.

5. There is no basis upon which the Tribunal should award costs allegedly incurred by the Applicant in connection with her claim.

The Tribunal, having deliberated from 1 to 21 November 2000, now pronounces the following judgement:

I. The Applicant appeals the Secretary-General's decision not to renew her fixed-term appointment. The Applicant claims that she had a legal expectancy of renewal of that appointment. She further claims that the non-renewal of her fixed-term appointment was prejudicial and arbitrary and that she did not receive full and fair consideration.

II. With respect to legal expectancy, the Tribunal has held that fixed-term appointments do not carry any legally enforceable expectation of renewal. However, the Tribunal has consistently stated that this rule is not absolute and that a legal expectancy may be inferred from the surrounding circumstances:

> "[The] Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and

> may be gathered from correspondence and surrounding facts and circumstances." (Judgement No. 95, *Sihand* (1965), para. III).

The Tribunal takes up the question of whether there was an expectancy of renewal, implicit or explicit. The Applicant claims that she took the assignment at the age of 54 with UNFPA and gave up her employment on the understanding and expectation of completing her career with UNFPA with a modest pension on retirement.

The Tribunal finds that the surrounding facts and circumstances created a reasonable expectancy of renewal. The Applicant was employed as an experienced gender expert, having worked previously for the United Nations. Given her age and the circumstances, she would not have abandoned other career alternatives and relocated to Suva without the possibility of benefiting from some continuity in her career. The programme to which she was assigned was not designed as a short-term project but as an important element in UNFPA's on-going work.

The Report of the Secretary-General on Human Resources Management (A/C.5/51/34 of 22 November 1996) to the General Assembly clearly sets forth the position of the Respondent on this issue:

> "10. ... While reaffirming that the fixed-term appointment, by its terms, does not create an expectancy of renewal, the Tribunal examines all the surrounding circumstances to determine whether an expectancy of renewal was created in the particular case - for example through a verbal or written commitment, albeit informal, made to the staff member by the programme manager that the appointment would be renewed. In addition, staff members who have served on fixed-term appointments for an extended period (usually five years or more) are recognized by the Tribunal as having the right to receive every reasonable consideration for further employment. Even though this does not amount to a legal expectancy of continued employment, which would be contrary to the specific terms of the fixed-term appointment, a finding that the Organization failed to give every reasonable consideration for further employment will result in the award of damages which may be substantial. Finally, and even in those cases where the decision not to renew was purely discretionary, the Tribunal always gives careful attention to the issue of whether the decision was affected by lack of due process, mistake of fact, prejudice or other extraneous motives. In such cases, the Tribunal would normally award damages to the staff member whose appointment was allowed to expire, on the ground that it is an implied condition of employment that all decisions, including a decision not to renew an appointment, are taken fairly and in the interests of the Organization."

III. The Applicant claims that with respect to renewal of contracts, staff on fixed-term appointments, including project staff, have a right to a decision free of bad faith or arbitrariness and reasonable consideration for reassignment elsewhere. (Judgement No. 347, *Sabatier* (1985)).

Discretionary authority is not absolute but must function within the requirements of due process and the pertinent rules and regulations:

> "...the discretion of the Secretary-General cannot be deemed absolute, for even in the exercise of discretionary powers, the Secretary-General cannot disregard, but must function within, the requirements of the applicable regulations." (Judgement No. 388, *Moser* (1987), para. II).

> "..., the Tribunal is competent to review the Respondent's decision if it is vitiated by lack of due process or by a mistake of fact or law, or is arbitrary or motivated by prejudice or by other extraneous factors." (Judgement No. 515, *Khan* (1991), para. II).

> "Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision." (Judgement No. 50, *Brown* (1953), para. 3).

The Applicant claims that her fixed-term appointment was not renewed due to abuse of power and discrimination. Although the Tribunal concurs with the JAB that the Applicant faced a difficult challenge with her supervisor, it finds that there was no violation of due process or improper motive in not renewing the Applicant's contract.

IV. As early as 1994 questions were raised in the Applicant's PAFs about two aspects of her performance. Her supervisors noted she had difficulties in her relationships with others and were somewhat dissatisfied with the relevance of her work product for the Agency. After noting those difficulties, the Respondent continued to extend her fixed-term contracts. It can be assumed that the Respondent believed the Applicant could become a successful member of the staff, with some effort on the part of all concerned. Regarding the difficulties in her relationships with her colleagues, the Respondent made some effort to redress the problem by meeting with the Applicant and transferring her to a different environment – the office in Bangkok. Unfortunately, this action did not improve

matters. Regarding the deficiencies in the work of the Applicant, noted in her PAFs, the Respondent failed to make a comparable effort to address and improve the performance of the Applicant, who had not been trained in statistical analysis, and without such training would remain below expectation, especially in a contentious work environment. Given the decisions of the Respondent to continue to employ the Applicant, the Respondent had some obligation to assist and counsel her on how to improve her performance. The Respondent only partially fulfilled his obligation.

V. The Applicant requests that she be awarded $8,000 compensation for the legal fees and related expenses and disbursements that she allegedly incurred in connection with her case. The Tribunal finds no merit in this claim. This Tribunal has held:

> "As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the Tribunal will not, as a general rule, grant costs to the Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal." (Judgement No. 237, *Powell* (1979), para. XXIX)."

VI. In conclusion, the Tribunal finds that the non-renewal of the Applicant's contract was not based on discrimination or improper motives. However, the Tribunal finds that due to the special circumstances of her employment at the age of fifty-four, her giving up her prior employment, coupled with her expertise as an experienced gender expert, and the fact that there was a continuing need for such expertise, that there was a reasonable expectancy for renewal. Consequently, the Tribunal awards the Applicant three months net base salary.

VII. In view of the foregoing, the Tribunal:

(a) Orders the Respondent to pay the Applicant three months net base salary at the rate in effect at the time of her separation from service;

(b) Rejects all other pleas.

(Signatures)

Mayer GABAY
Vice-President, presiding

Victor YENYI OLUNGU
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary

* * *

SEPARATE OPINION BY MS. MARSHA A. ECHOLS

I concur in the award of compensation for the reasons stated in paragraph IV only.

(Signatures)

Marsha A. ECHOLS
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary